

## Recent Religious Accommodations: Have We Gone Too Far Too Fast?

by

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## **ABSTRACT**

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Since 2009, the Department of the Army has granted religious accommodations for six soldiers to allow relief from the Army's grooming policy for males to be clean-shaven. It is an unprecedented number given the Army had not granted any such exceptions since the 1980s. This paper reviews the evolution of the need to wear and use uniforms to develop discipline, Army need for discipline, then uses a recent accommodation for a Jewish Orthodox rabbi allowing him a temporary accommodation to attend chaplain initial military training as an example to highlight potential policy challenges and ways to address the challenges of continued assignment specific temporary religious accommodations.





## RECENT RELIGIOUS ACCOMMODATIONS: HAVE WE GONE TOO FAR TOO FAST?

In January 2009, Rabbi Menachem M. Stern, an Orthodox Jewish Rabbi of the Chadbad Lubavitch community applied to join the United States (U.S.) Army Reserve.<sup>1</sup> In his application he acknowledged the Army cannot guarantee religious accommodations at all times, however, he stated he would not remove his beard in accordance with his religious beliefs.<sup>2</sup> In May 2009, Rabbi Stern requested an exemption from the Army's grooming regulation.<sup>3</sup> In June 2009, the Army e-mailed Rabbi Stern telling him that it selected him for a commission in the U.S. Army Reserve.<sup>4</sup> U.S. Army Human Resources Command issued Rabbi Stern orders dated September 1, 2009 appointing him in the Army Reserve;<sup>5</sup> however, it rescinded those orders the following day.<sup>6</sup> The Office of the Chief of Chaplains telephonically and in writing informed Rabbi Stern that administrative errors were the cause of him receiving the e-mail and appointment orders.<sup>7</sup>

Rabbi Stern sued in the U.S. District Court for the District of Columbia.<sup>8</sup> In his complaint, he sought the court to order the Army to commission him as a chaplain "and permanently prohibiting the Army from requiring him to shave."<sup>9</sup> Recently, the Department of Justice and the Army settled Rabbi Stern's case and the Army granted Rabbi Stern a temporary accommodation to allow him to attend chaplain initial military training. Rabbi Stern intends to apply to serve on active duty.<sup>10</sup>

The Army's recent granting of temporary and assignment specific grooming accommodations for religious beliefs raises concerns for good order and discipline, safety, Army flexibility in responding to future accommodations requests, and challenges for commanders without comprehensive guidance. In order to address these

concerns, the Army should direct surveys and use the surveys to establish a comprehensive policy or deny similar accommodations in the future. This paper will address potential strategic policy issues the Army may face in addressing future requests for accommodation from the Army grooming policy for religious accommodation. Using Rabbi Stern's case as an example, this paper will review the evolution of the need to wear and the use of uniforms, Army need for discipline, and will raise legal and Army policy considerations regarding continued strategic level temporary and assignment specific accommodations of the Army's grooming standards for religious beliefs.

#### Historical Use of Uniforms, Uniforms as Means of Communication, Control, and Authenticity, and U.S. Uniform Army Use and Culture

Leaders in the multinational Roman Empire used uniforms as a means to unify men where there was no previous connection between the men, such as "native language, religion, or other customs."<sup>11</sup> Uniforms helped build cohesion among the men by drawing attention away from class and ethnic differences. If the participants did not wear uniforms, or have unifying emblems or accoutrements, one could not distinguish friend from foe in the heat of battle whether nearby or at a distance.

After the first millennium, "military service was tied to land rights."<sup>12</sup> Landowners were the nobility and the nobility made up the military, either personally, or by paying others to fight. During this period, uniforms and equipment, like shields, were distinct often showing class status and family background.<sup>13</sup>

As the feudal system began to deteriorate, centralized kingdoms formed again hiring mercenaries to form their armies, but most did not have common uniforms. It was not until the forming of modern nation states did armies form a "professional officer

cadre” and uniforms returned as the norm.<sup>14</sup> While accoutrements of different colors differentiated various units and built esprit de corps, eventually colorful fighting uniforms gave way to drab colors as weapons improved in precision and camouflaging with the environment became more important.<sup>15</sup>

As uniforms became more common, they also provided a means of communication. That communication ranges from hierarchy, as with the military denoting superiority as evidenced by rank, shows the individual is part of a specialized field, such as medical scrubs shows the wearer is a member of the medical field, but ultimately, a uniform denotes one is part of an organization.<sup>16</sup> As part of an organization, the uniform can serve as a symbol of expected behavior and those observing the individual in uniform have expectations of how the uniform wearer should act.

For individuals in uniform, there are perceived expectations of behavior. Organizations ranging from schools, scouting, restaurants, mail/package delivery services, to military organization all have expectations of behavior tied to uniforms. Schools that require students to wear uniforms, both sports and daily wear, have expectations of behavior. Sports teams expect the players to know the rules, work as a team to win the game, while daily uniforms can connote part of school tradition that focuses on education, versus focusing on how the individual looks or the latest fashion trends. Soldiers wearing the uniform are expected to know certain Army customs, courtesies, and traditions, for example enlisted saluting officers, rendering honors to the flag, as well as proper appearance in uniform. Whether the wearer of the uniform behaves as expected is the decision of the wearer, but both others wearing the uniform and the public help enforce the expected behavior.<sup>17</sup>

Uniforms act as a means to control the uniform wearer. Uniform wearers internalize the expectations of those wearing the uniform and expect others to wear the uniform properly. Those in uniform help enforce the standard and often make on the spot corrections to address minor deviations. Military leadership may use corrective or disciplinary measures to address uniform deviations.

On the other hand, those outside the organization help enforce the organization's standards by observing and reporting when organization members appear to deviate from the standards. For example, a community member may report misbehaving soldiers at a bar to the installation Provost Marshal to help encourage better behavior the next time soldiers frequent the bar.

Wearing a uniform also gives an element of authenticity. By properly wearing a uniform, it shows the wearer has been "granted the right to wear the group uniform," the individual is qualified to wear the uniform, and that members of the group are supervising the individual.<sup>18</sup> For the individual wearing the uniform, the uniform serves as a "declaration" that the individual will follow the rules and norms of the organization, and that failure to follow the rules can result in disciplinary action.<sup>19</sup>

If a member of an organization fails to wear the uniform properly, others may see the individual as disparaging or denying the legitimacy of the group and others may view the legitimacy of the group diminished.<sup>20</sup> Both views can lessen the respect for the uniform and those who wear the uniform, both by those who wear the same uniform and by those outside the organization that see the individual in uniform.

While there is no international definition of a military uniform, the international community expects nation states to establish uniforms so others recognize the

uniformed personnel as members of an armed force and distinguished from civilians.<sup>21</sup> The U.S. Army has defined what soldiers wear in Army Regulation 670-1 and the Army provides gear for soldiers use. In garrisons, soldiers wear their uniforms unless the commander allows for the wear of civilian clothes, or the mission requires otherwise.<sup>22</sup> Likewise, in combat environments, soldiers wear the proper uniform to carry out the military mission, and to distinguish themselves from the local nationals and from the enemy they are fighting.<sup>23</sup> Additionally, militaries wear uniforms in part because international law entitles belligerents Enemy Prisoner of War status if captured by the enemy, with the protections of the Geneva Conventions.<sup>24</sup>

Although a military uniform distinguishes a service member from a civilian, the Army uniform is more: it is an artifact and a part of the Army culture. An organization's culture has three levels: artifacts, espoused values, and basic underlying assumptions.<sup>25</sup> An artifact of an organization is what "one sees, hears, and feels when one encounters a new group with an unfamiliar culture."<sup>26</sup> For the Army, that includes uniforms, specialized language, use of acronyms, and drill and ceremonies. The espoused values are "non discussable assumptions supported by articulated sets of beliefs, norms, and operations rules of behavior" that an organization creates and adopts as it continues to operate.<sup>27</sup> For the Army, that includes dedication to the mission, before self. A culture's basic assumptions are ideas about the organization that individuals take for granted, but that guide the members' behavior, and are hard to change.<sup>28</sup> As recruits join the Army, each brings with them their own basic assumptions, they learn the basic assumptions of the Army through their daily experiences, and create a shared history. What is produced may be new or nuanced assumptions that become part of the Army culture.

The evolution of warfare, from using rudimentary weapons to the highly sophisticated weapons the Army uses today, as well as the evolution of international norms and laws regarding armed conflict require the wear of uniforms. For the Army, the uniform is part of the organization's culture and is a basis of discipline.

### The Army Requires Discipline to Win the Nation's Wars

The U.S. Army is the land forces provider to the Department of Defense (DoD) effort to support and defend the Constitution, defend the American way of life against enemies foreign and domestic, and when called upon, fight and win our nation's wars.<sup>29</sup> To be able to fight and win our nation's wars, soldiers need many values, skills, and equipment, but at the core, each soldier must have discipline. That discipline includes self-discipline and unit cohesion, as well as mission accomplishment ahead of self-interest.<sup>30</sup> The Army nurtures and demands discipline through individual and group training, starting when a soldier enlists and continues throughout the soldier's length of service.

At the foundation of self-discipline is the Army's personal appearance regulation that states:

The Army is a uniformed service where discipline is judged, in part, by the manner in which a soldier wears a prescribed uniform, as well as by the individual's personal appearance. Therefore, a neat and well-groomed appearance by all soldiers is fundamental to the Army and contributes to building the pride and esprit essential to an effective military force. A vital ingredient of the Army's strength and military effectiveness is the pride and self discipline that American soldiers bring to their Service through a conservative military image. It is the responsibility of commanders to ensure that military personnel under their command present a neat and soldierly appearance.... Soldiers must take pride in their appearance at all times, in or out of uniform, on and off duty. Pride in appearance includes soldiers' physical fitness and adherence to acceptable weight standards.<sup>31</sup>

The regulation continues to state that there may be exceptions to appearance standards based on religious practices that the author will discuss later in the paper. The Army has multiple documents, such as laws, regulations, and executive orders that direct and guide the discipline and actions of soldiers, but the rich Army history also guides much of that behavior.

Army Regulation 600-20, *Army Command Policy*, states military discipline is:

Manifested in individuals and units by cohesion, bonding, and a spirit of teamwork; by smartness of appearance and action; by cleanliness and maintenance of dress, equipment and quarters, by deference to seniors and mutual respect between seniors and subordinate personnel, by the prompt and willing execution of both the letter and spirit of the legal orders of their lawful commanders; and by fairness, justice, and equity for all Soldiers, regardless of race, religion, color, gender, and national origin.<sup>32</sup>

Discipline and training is what gives soldiers the personal courage to follow orders to achieve their mission, even if following those orders could result in the loss of lives.

Commanders at all levels are responsible for the collective good order and discipline of the command to ensure the unit can accomplish its mission.

Given the noted importance of appearance and dress in military discipline, one could infer a need for uniformity, as in all personnel wearing the same uniform, in the same way, in all formations. However, *Army Command Policy* provides commanders with some leeway. For example, commanders can establish uniformity in physical training formations, however, *Army Command Policy* notes that commanders “will consider” physical training uniforms present challenges for soldiers, both male and female, because of religious faiths, modesty beliefs, and personal physiology.<sup>33</sup>

The Army requires disciplined soldiers to fight and win our nation’s wars. That discipline begins with the wear and appearance of the uniform and the focus on mission

accomplishment above self-interest, while making religious accommodations when possible.

#### Army Regulations on Hair, Beards, and Religious Accommodations

Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia*, establishes hair-grooming standards to “maintain uniformity within a military population.”<sup>34</sup> The regulation prescribes the length of head hair for both men and women, making certain allowances for women to wear longer hairstyles. The regulation prohibits the wear of beards, except if a medical authority prescribes a beard, however, the length of hair will normally not exceed one-quarter inch.<sup>35</sup>

While the regulation states that the Army will not allow exceptions to the hair and grooming policy based on religious practices, it recognizes that the Army had granted exceptions in the past and those exceptions granted in accordance with *Army Command Policy*, before January 1, 1986, remain as long as the soldier meets retention standards.<sup>36</sup> However, the regulation also provides that soldiers who received previous authority “to wear unshorn hair, unshorn beard, or permanent religious jewelry will not be assigned permanent duty station or temporary duty out of the continental United States due to health and safety considerations.”<sup>37</sup>

Although the Army has a strict grooming policy, the Army values and recognizes the importance of allowing soldiers to practice the tenets of their religious faiths. The Department of the Army, Deputy Chief of Staff, G-1, is the proponent of Army Regulation 600-20 and he establishes the Army policy on religious practices accommodations. Army Regulation 600-20, *Army Command Policy* directs approval of religious practices accommodations unless the accommodation will have an “adverse impact on unit readiness, individual readiness, unit cohesion, morale, discipline, safety,



and/or health.”<sup>38</sup> The requestor’s commander will act on the request. If the commander denies the request, Army Regulation 600-20, provides an appeal process.<sup>39</sup>

Commanders, often in conjunction with their command or post chaplain, routinely address requests for religious accommodations. Common requests include consideration for dietary requirements, release from training or duty for religious holidays/holy days, or special observances, and wear of yarmulke indoors.

Since 2009, Headquarters Department of the Army has granted temporary and assignment specific accommodations for five other soldiers, besides Rabbi Stern. Three Sikhs received accommodations from the Army grooming standards, for religious reasons. Kamaljit Singh Kalsi, a doctor, received an accommodation for his hair and wear of a turban in October 2009,<sup>40</sup> and shortly thereafter, Tejdeep Singh Rattan, a dentist, received such an accommodation.<sup>41</sup> Simran Preet Singh Lamba sought to join the Army in 2009 through the Military Accessions Vital to the National Interests (MAVNI) program, but did not receive a similar accommodation until 2010.<sup>42</sup> The MAVNI program authorized the Army to recruit select legal aliens.<sup>43</sup> The program focused on health care professionals and had a separate program in New York City to recruit persons with critical language skills.<sup>44</sup> Lamba’s language skill includes Punjabi and Hindi.<sup>45</sup> Lamba is an enlisted medic.<sup>46</sup> The other two accommodations were given to serving health care providers, a surgeon and anesthesiologist resident, who requested and received permission to grow and maintain a beard in accordance with their Muslim faith.<sup>47</sup> Although Army regulations require male soldiers to be clean-shaven and limit the length of their hair, the Army has granted exceptions in order to further religious sensitivity.

## Review of Canada, United Kingdom, and Netherlands Policy on Head and Facial Hair

Some militaries have religious accommodations for males who maintain facial and head hair for religious purposes. In addition, one nation allows soldiers to wear their hair as they want in domestic settings, but imposes conditions in international settings.

The Canadian Forces (CF) dress and grooming standards recognize and address religious and spiritual accommodations through regulation. For example, CF allow Sikhs to maintain unshorn head and facial hair. However, if mission or safety requires specialized facial gear or headgear, the Sikh members may need to “modif[y]” their hair to allow proper use of the equipment.<sup>48</sup>

For religious and cultural reasons, the United Kingdom allows Army Muslim men to maintain “neatly trimmed beards.”<sup>49</sup> If the soldier’s job includes the wear of specialized facial gear, the soldier may have to remove his facial hair. Likewise, Sikhs may maintain unshorn facial hair, with the same exception as noted above for Muslim men with beards. The United Kingdom also allows Sikhs to maintain unshorn head hair unless their job requires special headgear. For example, helmets worn in armored vehicles and worn by pilot crews would not accommodate unshorn hair.<sup>50</sup>

Since the 1970s, Netherland soldiers may wear their hair and beards as they like, except those working in an international setting. Netherland requires soldiers working in an international setting to wear hair “in a proper way.”<sup>51</sup> A soldier may have no facial hair, or maintain a neatly trimmed a beard or mustache. Netherlands does not have a written regulation or policy on facial or head hair; instead, they follow decisions from prior labor relations cases. Netherlands law requires safe working conditions, and the military provides safety equipment for soldiers to use.<sup>52</sup>

Two western militaries recognize and accommodate certain religious practices regarding head and facial hair. Both countries however recognize safety concerns may cause the cutting or modifying of head and facial hair. Netherlands takes a slightly different approach, soldiers may wear their hair as they wish in Netherlands, but tighten the standards if deployed outside the country.

#### Issues for Army Consideration in Light of Temporary and Assignment Specific Accommodations

As the Army plans for the scheduled transfer of security in Afghanistan to the Afghan National Security Forces by July 2014 and the announced personnel and budget cuts, the Army will have fewer soldiers and more of those soldiers will remain in the United States. With the drawdown, the Army will be more selective in whom it recruits. The Army should decide now whether to change its policy to allow beards for all male members, or establish in regulation under what conditions the Army will favorably consider requests for hair grooming accommodations for religious reasons, vice making temporary and assignment specific accommodations. Before making those decisions, the Army must address whether continued granting of temporary accommodations will be divisive, and what are the unforeseen issues that may arise with the current use of temporary and assignment specific accommodations.

A glance at basic training in World War II offers a glimpse of building a soldier. During World War II, the U. S. Government drafted hundreds of thousands of soldiers. By cutting each recruits hair, issuing each a uniform to wear, forcing the recruits to eat together, and sleep in communal barracks, the Army stripped down the recruits, made them uncomfortable, and alone. It was only after each recruit put aside his civilian life could the Army build each recruit to be equals.<sup>53</sup>

Today, Initial Entry Training continues in much the same way. Recruits come into the Army, drill instructors break them down and build them up as equals. While shaving head hair is not required when entering the Army, many soldiers do shave their head hair in basic training. Losing the hair, whether all or part, is a shared experience and part of the transformation from citizen to soldier.

What is different? Those entering the Army come voluntarily and are willing to accept values and traits of the Army, as well as the hardships the Department of Defense will place on them.<sup>54</sup> If certain recruits are not required to shave their facial hair, or receive or wear a military regulation haircut, will fellow recruits treat them as equals?

The Army has long embraced the concept of “train as you fight” and “fight as you trained.” Given the U.S. Army has been fighting with Afghans, Iraqis and other coalition partners that wear beards and longer head hair and some U.S. Special Operations Forces wore beards and longer head hair, as a non-standard uniform, when working with Afghans,<sup>55</sup> should the Army continue to require the shaving of beards, with the exception of temporary and assignment specific accommodations for religious reasons?

Since 2009, the Army has granted five temporary accommodations, not including Rabbi Stern. Four of the five accommodations were given to officers and all five are in the medical profession. Rabbi Stern is attending chaplain initial military training. While the basic training for officers is different from enlisted members, medical corps and chaplain corps candidates may not consider the beard divisive. Medical and chaplain personnel may be more accepting as both are in professions to help others, medically and spiritually.

On a one-on-one basis, the wear of a beard and unshorn hair may not be divisive. The soldier can explain his religious beliefs and why he wears a beard and does not cut his hair and how his beliefs affect, or do not affect, his ability to wear the uniform, do physical training, learn basic combat skills, etc. Soldiers that have a strong or similar religious faith may seek the member out because he remains faithful to his religious beliefs.

For those that do not interact with the member who does not cut his head hair or facial hair, it may be divisive. Soldiers may question the soldier's loyalty to the Army, and whether the unshorn soldier subordinates his self-interests to the Army. Soldiers may not be comfortable serving with the member while deployed because, as the Army suggested in response to Rabbi Stern's lawsuit, a soldier with unshorn head and facial hair may be a target in conflicts that are religiously motivated.<sup>56</sup> This could put the safety of all those around the unshorn soldier at risk.

The Army could consider taking the stance of the Netherlands military. The Netherlands government provides the service member the gas mask that works best with no facial hair. If the service member decides he will use it with facial hair, he assumes the risk that it may not work, or may not work as well. It would be under exceptional circumstances that Netherlands would order a soldier to cut his hair given previous labor relations decisions.<sup>57</sup> Alternatively, the Army could consider letting the member provide his own mask, obtaining a mask found reliable by other countries for bearded members. Neither option is ideal. Both options open the Army to unnecessary investigations and scrutiny, potential legal actions, and unintended consequences. As

recently as 2009, official testing of Army approved protective masks concluded bearded subjects were unable to obtain a proper seal.<sup>58</sup>

While the Army should not decide a course of action because it may generate investigations or litigation, the Army should thoughtfully consider continued granting of temporary accommodations in light of previous religious accommodation litigation involving the military, U.S. statutes, and how outside observers may view the Army temporary accommodations decisions of the past three years. Religious issues are often litigated because the litigants perceive an infringement on deeply held religious beliefs.

#### Legal Implications of Temporary and Assignment Specific Grooming Accommodations for Religious Beliefs

Friction between the exercise of religious freedom and the protection against the establishment of religion has existed for much of our U.S. history. Courts, at all levels, address that friction when cases come before them for resolution. Depending on the court, various legal tests are used to address the friction. For the U.S. military, the notable case regarding the free exercise of religion is *Goldman v. Weinberger*.<sup>59</sup>

S. Simcha Goldman, after completing his PhD in psychology, with the Armed Forces Health Professions Scholarship Program in an Air Force inactive reserve status, served on active duty as a clinical psychologist.<sup>60</sup> Before he completed his PhD, he had served two years in the Navy as a chaplain.<sup>61</sup>

During his time in the Navy, and on his entry of active duty in the Air Force, Goldman wore his yarmulke indoors, and when outdoors, on duty he wore it under his military cover.<sup>62</sup> In 1981, after serving as a defense witness in a court-martial, Goldman received an order from his commander that prohibited him from wearing his yarmulke

because it did not comply with Air Force regulation.<sup>63</sup> The initial order prohibited wear of the yarmulke outside the hospital where he worked, and Goldman later received an amended order that prohibited wear inside the hospital.<sup>64</sup> Goldman sued in the U.S. District Court for the District of Columbia and was successful.<sup>65</sup> He lost on appeal to the District of Columbia Circuit Court and before the U.S. Supreme Court. The Supreme Court ruled in favor of the Air Force upholding the Circuit Court decision that examined the Air Force uniform policy "to determine whether "legitimate military ends are sought to be achieved," and whether it is "designed to accommodate the individual right to an appropriate degree," and found "the Air Force's interest in uniformity renders the strict enforcement of its regulation permissible."<sup>66</sup>

Congressional and DoD's response to the *Goldman* decision is important because it can inform what was done in a similar situation and may offer suggestions on how the Army should react given the recent settling of litigation with Rabbi Stern. The District Court of the District of Columbia and the U.S. Supreme Court gave great deference to the military; those Courts may not give that degree of deference if addressing a similar case today.

Following the District Court for the District of Columbia decision, several Congressmen spoke out against the Air Force uniform regulations.<sup>67</sup> Ultimately, the 1985 Defense Authorization Bill included a requirement that "the Secretary of Defense shall form a study group to examine the ways to minimize the potential conflict between the interests of members of the Armed Forces in abiding by their religious tenets and the military interest in maintaining discipline."<sup>68</sup> DoD conducted a study and sent the

reported titled *Joint Service Study on Religious Matters* report to Congress in May 1985.<sup>69</sup>

The report contains three findings addressing uniform requirements and the relaxation of those standards for religious apparel.<sup>70</sup> Those findings include: “Military uniform and appearance standards contribute significantly to the cohesion and the discipline of military units. Cohesion and discipline are essential to a highly effective military force;”<sup>71</sup> “Except when permitted in sharply limited and clearly defined circumstances, visible or otherwise apparent exceptions to military uniform and appearance standards have a significant adverse impact on cohesion, discipline, and military effectiveness;”<sup>72</sup> and “Creation of a mandatory standard for accommodation of personal, religious practices in the Armed Forces runs a grave risk of undermining esprit de corps, military discipline and the military justice system.”<sup>73</sup>

The authors of the report did not rely on empirical data, as such data was “almost impossible to acquire,”<sup>74</sup> to reach their conclusions, instead, the authors relied on their “professional military judgment and experience.”<sup>75</sup> The Joint Report led to the DoD implementing guidance on accommodations of religious practices in the military in DoD Directive and subsequently in Army Regulation.<sup>76</sup>

In 1987, Congress passed legislation titled *Religious Apparel: Wearing While in Uniform* hereinafter referred to as 10 U.S. Code § 774.<sup>77</sup> The statute allowed military members to wear religious apparel unless a service secretary finds the wear of apparel would “interfere with the performance of the member’s military duties” or if the service secretary finds “the item of apparel is not neat and conservative.”<sup>78</sup> The statute also



directed the service secretaries to issue regulations to address the wear of religious apparel while in uniform.<sup>79</sup>

The DoD Instruction 1300.17 implements 10 *U.S. Code* § 774 by recognizing the U.S. Constitution restriction on laws prohibiting the free exercise of religion and states “The Department of Defense places a high value on the rights of members of the Military Services to observe the tenets of their respective religions.”<sup>80</sup> The directive further states the policy is to grant religious accommodation requests if the “accommodation will not have an adverse impact on mission accomplishment, military readiness, unit cohesion, standards, or discipline.”<sup>81</sup>

Just as the military recognized the importance of allowing members to practice the tenets of their faith, in 1993, Congress enacted the *Religious Freedom Restoration Act* (RFRA) to mandate a greater scrutiny in reviewing government actions that impede a person’s free exercise of religion.<sup>82</sup> The RFRA reinstated the “compelling interest test” as the test to “strike sensible balances between religious liberty and competing prior governmental interests.”<sup>83</sup> The Supreme Court had eliminated the compelling interest test in a 1990 case and this legislation reestablished that test in reviewing government actions that allegedly impede a person’s free exercise of religion.<sup>84</sup>

If a plaintiff challenges the Army in litigation alleging the Army’s refusal to allow his beard is burdening his free exercise of religion, and is a violation of the RFRA, the court may require the Army to show a compelling governmental interest for the current grooming policy and that the grooming policy “is the least restrictive means to achieve that interest.”<sup>85</sup> Although the RFRA does not define “compelling interest,” the Army should focus on national security and safety, and not administrative or financial costs

when formulating why the Army has a compelling interest for the current grooming policy.

The Army must link the basis of discipline, which as Army Regulation 670-1, *Wear and Appearance of Army Uniforms* states, begins with the wear of the uniform and personal appearance, with subordination of self for the greater good, which is what makes the Army a disciplined force that is able to protect and defend our nation. While the opinion of senior military leaders, who have years of service, have defended our nation in battle and led others in battle is critical, the Army should consider gathering empirical data from all ranks to support a compelling interest claim.

The Army should direct a senior level review to explore whether uniformity in uniform is critical to good order and discipline. If the group determines it is, and believes this issue may be ripe for dialogue with senior civilian leadership, the group should consider the recommendations made in a 1989 U.S. Army War College group study project, conducted by four senior level chaplains, that “The Deputy Chief of Staff for Personnel should use the Biannual Soldiers’ Survey to assist in ascertaining the level of accommodation of religious practices,” and “A future Military Study Project should be done at the United States Army War College to study the attitudes of incumbent battalion and brigade commanders toward the accommodation of religious practices.”<sup>86</sup> By conducting two studies, the Army can obtain a sense of the entire organization and use the results to establish a comprehensive policy or deny similar accommodations in the future. Dialogue with Army senior civilian leaders is critical, as this policy will have political implications and the Army will need civilian leadership support if they choose to deny similar accommodations in the future.

As the U.S. has ended deployment in Iraq, and has set a deadline for the departure of combat troops in Afghanistan, the Army will study lessons learned and how the Army must adapt and change doctrine. It is a timely opportunity to study, survey, and assess whether there continues to be a need for a “uniform” Army where male soldiers are clean-shaven and whether it should continue temporary and assignment specific religious accommodations.

### Conclusion

The Army’s efforts to increase religious accommodations have opened new and possibly unforeseen challenges that may interfere with Army discipline. With the downsizing of the Army, the Army should comprehensively review these accommodations to determine whether the Army should deny future accommodations, or continue to allow them with additional guidance as suggested below. To conduct this review, Army senior leadership should direct a working group to survey and address the strategic implications of recent religious accommodations.

Continued temporary and assignment specific accommodations raise policy and operational issues, as well as a burden on the individual soldier that require further consideration or development by Army leadership. In the policy area, the Army should address whether continued granting of temporary and assignment specific accommodations for a period years creates a precedent such that the Army may be required to make the accommodations permanent, and is there a shortage, or anticipated shortage, of religious and medical personnel that accommodations of the Army grooming standards are necessary to target a specific class of recruits. Additionally, if a soldier is not able to deploy because the armed conflict is religiously motivated and the soldier with the temporary accommodation may be a target, putting

him and others at risk, will promotion boards require special guidance to address the lack of a deployment in the soldier's record. The Army should review *Army Command Policy*, as it currently states soldiers who received religious accommodations before 1986 for unshorn hair and beard "will not be assigned" permanently or temporarily outside the U.S. for "health and safety considerations," to determine whether to remove or update since the Army deployed at least one Sikh officer.<sup>87</sup> Finally, are there other requests for religious accommodations that the Army should anticipate for accommodation, or will allowing these accommodations for a select few open the door to requests for other religious accommodations or recognition?

One policy issue that may be beyond the limit of the Army is whether the armed conflict is religiously motivated, which may put a bearded and turban wearing soldier and others around him at heightened risk. The Department of Defense may need to make this decision. If not, what level of Army leadership should decide? Is it a combatant command level decision or a theater command level decision? What guidance should the Army give to commanders to consider before putting soldiers with temporary and assignment specific accommodations on deployment orders?

Another operational issue is whether soldiers who have a temporary and assignment specific accommodation are able to meet the Army standard for correctly donning an issued protective mask. Finally, are there tactical implications of these strategic level temporary accommodations that necessitate department level guidance for commander at all levels?

Temporary and specific accommodations provide a great opportunity for interested persons to serve in the U.S. Army, that before two or three years ago were

not able to serve. However, it is burdensome on the soldier to generate packets for continued religious accommodation every eighteen to thirty-six months. Enthusiastic and dedicated soldiers are going to ask supervisors and commanders to support their request each time they submit a request for accommodation.

The Department of the Army's recent granting of temporary and assignment specific grooming accommodations for religious beliefs raises concerns for good order and discipline, safety, Army flexibility in responding to future accommodations requests, and challenges for commanders without comprehensive guidance. Without establishing a thoughtful approach, the Army may lose the ability to grant future temporary and assignment specific accommodations and may be creating unnecessary challenges for commanders at all levels. With the planned Army reduction in forces, the Army should suspend granting temporary and assignment specific religious accommodations until it reviews this policy to determine whether continuing is in the best interests of national security and discipline. After all, discipline is what enables the U.S. Army to fight and win our nation's wars.

### Endnotes

<sup>1</sup> *Stern v. Secretary of the Army*, Memorandum in Support of Defendant's Motion to Dismiss and/or Summary Judgment, U.S. District Court for the District of Columbia, No 10-2077, June 24, 2011, 9.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Peter Dubinin, e-mail message to Menachem Stern, *Stern v. Secretary of the Army*, Complaint, U.S. District Court for the District of Columbia, No 10-2077, Exhibit 3.

<sup>5</sup> Ibid., Mark A. Galantowicz, memorandum for Menachem M. Stern, Exhibit 4.

<sup>6</sup> Ibid., Mark A. Galantowicz, memorandum for Rabbi Menachem M. Stern, Exhibit 5.

<sup>7</sup> Ibid., Scottie R. Lloyd, letter to Menachem Stern, Exhibit 6.

<sup>8</sup> *Stern v. Secretary*, Motion to Dismiss, 2; Matt Sedensky, "Rabbi to Become Army Chaplain, Beard and All," Associated Press Online, December 8, 2011, <http://news.yahoo.com/rabbi-become-army-chaplain-beard-173612195.html> (accessed January 23, 2012).

<sup>9</sup> Ibid., *Stern v. Secretary*.

<sup>10</sup> Sedensky, "Rabbi to Become Chaplain."

<sup>11</sup> David W. Meyler, "Dressed to Kill: The Role of Uniforms in Military History," *Command Magazine* 25, (Nov – Dec 1993): 42.

<sup>12</sup> Ibid., 44.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., 44 -46.

<sup>15</sup> Jennifer Craik, *Uniforms Exposed: From Conformity to Transgression* (Oxford: Berg Publishers, 2005), 25.

<sup>16</sup> Nathan Joseph, *Uniforms and Nonuniforms: Communicating through Clothing* (New York: Greenwood Press, 1986), 60.

<sup>17</sup> Ibid., 72, 50.

<sup>18</sup> Ibid., 67.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid., 68, 69.

<sup>21</sup> U.S. Department of War, Manual, *Rules of Land Warfare* (1914, corrected to April 15, 1917), para. 22, cited in W. Hays Parks, "Special Forces' Wear of Non-Standard Uniforms," *Chicago Journal of International Law* 4, no. 2 (Fall 2003), 516.

<sup>22</sup> U.S. Department of the Army, AR 670-1, *Wear and Appearance of Army Uniforms and Insignia*, Army Regulation 670-1 (Washington, DC: U.S. Department of the Army, February 3, 2005), 7.

<sup>23</sup> Parks, "Special Forces' Wear," 515.

<sup>24</sup> *Convention (III) relative to the Treatment of Prisoners of War* (Geneva, August 12, 1949), Art. 4, <http://www.icrc.org/ihl.nsf/FULL/375?opendocument> (accessed February 27, 2012).

<sup>25</sup> Edgar H. Schein, *Organizational Culture and Leadership*, 2<sup>nd</sup> ed. (San Francisco: Jossey-Bass Publishers, 1997), 17.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., 20.

<sup>28</sup> Ibid., 22.

<sup>29</sup> U.S. Department of the Army, *The Army*, Field Manual 1 (Washington, DC: U.S. Department of the Army, June 2005), 1-1.

<sup>30</sup> U.S. Department of the Army, *Army Command Policy*, Army Regulation 600-20 (Washington, DC: U.S. Department of the Army, March 18, 2008), 22.

<sup>31</sup> U.S. Department of the Army, *Wear and Appearance of Army Uniforms*, 2.

<sup>32</sup> U.S. Department of the Army, *Army Command Policy*, 22.

<sup>33</sup> U.S. Department of the Army, *Army Command Policy*, 42. The regulation also notes that the Army does not “single out for special accommodation, restriction, or prohibition” personal grooming standards for religious reasons, except those accommodations granted before January 1, 1986. Ibid., 42-43.

<sup>34</sup> U.S. Department of the Army, *Wear and Appearance of Army Uniforms*, 3.

<sup>35</sup> U.S. Department of Army, *Pseudofolliculitis of the Beard and Acne Keloidalis Nuchae*, Technical Bulletin 287 (Washington, DC: Department of Army, September 1, 2000), 6.

<sup>36</sup> Ibid., 2, 3.

<sup>37</sup> U.S. Department of the Army, *Army Command Policy*, 41-42.

<sup>38</sup> Ibid., 40.

<sup>39</sup> Ibid., 43.

<sup>40</sup> “Army Allows Sikh to Keep Beard, Turban, Uncut Hair,” CNN.com Online, October 28, 2009, [http://articles.cnn.com/2009-10-28/us/sikh.us.forces\\_1\\_sikh-coalition-uncut-hair-turban?\\_s=PM:US](http://articles.cnn.com/2009-10-28/us/sikh.us.forces_1_sikh-coalition-uncut-hair-turban?_s=PM:US) (accessed January 28, 2012).

<sup>41</sup> Michelle Roberts, “Sikh Army Captain Graduates: Tejdeep Singh Rattan is First Sikh US Army Officer in Decades,” Huffingtonpost.com Online, March 23, 2010, [http://www.huffingtonpost.com/2010/03/23/sikh-army-captain-graduat\\_n\\_509294.html](http://www.huffingtonpost.com/2010/03/23/sikh-army-captain-graduat_n_509294.html) (accessed January 28, 2012). Rattan completed Medical Officer Basic Training.

<sup>42</sup> Zachary J. Foster, “Simram Preet Singh Lamba: Joins U.S. Army as Enlisted Soldier,” Sikhchic.com Online, November 11, 2010, <http://sikhchic.com/article-detail.php?id=1968&cat=26> (accessed January 28, 2012).

<sup>43</sup> U.S. Department of Defense, “Military Accessions Vital to National Interest (MAVNI) Recruitment Pilot,” <http://www.defense.gov/news/MAVNI-Fact-Sheet.pdf> (accessed February 4, 2011).

<sup>44</sup> Dan Redys, "Mavni Frequently Asked Questions by Margaret D. Stock Read First," November 13, 2009, 8:41 a.m., *Ask a Soldier*, discussion, <https://forums.goarmy.com/thread/198213> (accessed February 4, 2011).

<sup>45</sup> *Ibid.*

<sup>46</sup> Vincent T. Davis, "Army Made an Exception for Future Medic: First Sikh Enlisted Man in 30 Years Trains at Fort Sam," *San Antonio Express News Online*, March 26, 2011, [mysanantonio.com/community/article/Army-made-an-exception-for-future-medic-1307113.php](http://mysanantonio.com/community/article/Army-made-an-exception-for-future-medic-1307113.php) (accessed January 29, 2012).

<sup>47</sup> Thomas P. Bostick, Declaration of General Thomas P. Bostick, *Stern v. Secretary*, Motion to Dismiss, 9, 10.

<sup>48</sup> Canadian Department of National Defence, Canadian Forces Dress Instructions, A-DH-265-000/AG-001 (Ottawa, Canada: Canadian Department of National Defence, March 1, 2011), 2-3-1, 2-3-4 – 5.

<sup>49</sup> U.K. Ministry of Defence, "Religious and Cultural Guidance Fact Sheet," [http://www.army.mod.uk/documents/general/Religious\\_Fact\\_Sheet.pdf](http://www.army.mod.uk/documents/general/Religious_Fact_Sheet.pdf) (accessed February 27, 2012).

<sup>50</sup> *Ibid.*

<sup>51</sup> B.D. Jansen, e-mail message to author, December 5, 2011. Used by permission.

<sup>52</sup> *Ibid.*

<sup>53</sup> Thomas Bruscino, *A Nation Forged in War: How World War II Taught Americans to Get Along* (Knoxville, Tenn: The University of Tennessee Press 2010).

<sup>54</sup> Robert Goldich, *American Military Culture from Colony to Empire*, *Daedalus* 140, no. 3 (Summer 2011), <http://search.proquest.com/docview/903556068/134CEE99DD1B42FC2C/2?accountid=4444> (accessed March 2, 2012).

<sup>55</sup> Parks, "Special Forces' Wear," 497, 498, 504. The attire was not worn to look like the civilian population, but instead to "lower the visibility of the US forces" as they supported the indigenous forces. *Ibid.*, 497, 504.

<sup>56</sup> Bostick, "Declaration," 7,8.

<sup>57</sup> B.D. Jansen, email message to author, December 7, 2011. Used by permission.

<sup>58</sup> Alex G. Pappas, Declaration of Mr. Alex G. Pappas, *Stern v. Secretary*, Motion to Dismiss, 4.

<sup>59</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>60</sup> *Ibid.*, 504.



<sup>61</sup> Samuel J. Levine, "Untold Stories of *Goldman v. Weinberger*: Religious Freedom Confronts Military Uniformity," *The Air Force Law Review*, no. 66 (2010): 208.

<sup>62</sup> *Goldman*, 505.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, 503.

<sup>66</sup> *Ibid.*, 506.

<sup>67</sup> Dwight H. Sullivan, The Congressional Response to *Goldman v. Weinberger*, *Military Law Review* 121, (Summer 1988): 135.

<sup>68</sup> Department of Defense Authorization Act, 1985, Pub.L. No. 98-525 § 554 (a), 98 Stat. 2492, 2532 (1984) cited in Sullivan, "Congressional Response to *Goldman*," 137.

<sup>69</sup> Thomas R. Folk, "Religions and the Military: Recent Developments," *The Army Lawyer*, December 1985, 6.

<sup>70</sup> Sullivan, "Congressional Response to *Goldman*," 138.

<sup>71</sup> Joint Study Group on Religious Practice, *Joint Service Study Group on Religious Matters March 1985* (Washington, DC: U.S. Department of Defense, March, 1985), xi.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, xii.

<sup>74</sup> Sullivan, "Congressional Response to *Goldman*," 139.

<sup>75</sup> Joint Study Group on Religious Practice, *Joint Service Study*, Section III 8.

<sup>76</sup> Folk, "Religious and Military Developments," 7; U.S. Department of Defense, *Accommodation of Religious Practices Within the Military Services*, Department of Defense Instruction 1300.17 (Washington, DC: U.S. Department of Defense, February 10, 2009); U.S. Department of the Army, *Army Command Policy*.

<sup>77</sup> *Religious Apparel: Wearing While in Uniform*, U.S. Code 10 (1987), § 774.

<sup>78</sup> *Ibid.*, a, b.

<sup>79</sup> *Ibid.*, c.

<sup>80</sup> U.S. Department of Defense, *Accommodation of Religious Practices*, 2.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Religious Freedom Restoration Act*, U.S. Code 42 (1993) § 2000bb.

<sup>83</sup> Ibid., (a)(5).

<sup>84</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990), cited in *Religious Freedom Restoration Act*, (a)(4).

<sup>85</sup> *Religious Freedom Restoration Act*, (a)(3), cited in David E. Fitzkee and Linell A. Letendre, "Religion in the Military: Navigating the Channel Between the Religion Clauses," *The Air Force Law Review*, no. 59, (2007), 69.

<sup>86</sup> Richard M. Goellen, Gaylord T. Gunhus, Gaylord E. Hatler, and Jerry D. Reynolds, *A Study of the Accommodation of Religious Practices in the United States Army*, Group Study Project (Carlisle Barracks, PA: U.S. Army War College, March 31, 1989), 49.

<sup>87</sup> U.S. Department of the Army, *Army Command Policy*, 42-43; "Major Kamaljeet Singh Halsi honored with a Bronze Star by US military," Prarasi Herald Online, December 8, 2011, [http://www.pravasiherald.com/index.php/pravasih/print\\_t/major\\_kamaljeet\\_singh\\_11/print](http://www.pravasiherald.com/index.php/pravasih/print_t/major_kamaljeet_singh_11/print) (accessed March 3, 2012).